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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RUSSELL HOBSON, III,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. DOES THE GOVERNMENT HAVE AN OBLIGATION UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND UNDER THE FEDERAL RULES OF APPELLATE PROCEDURE TO CORRECT SERIOUS MISREPRENTATIONS OF FACT THAT IT MAKES TO A COURT OF APPEALS WITH RESPECT TO THE CONTENTS OF THE RECORD IN A MULTIDEFENDANT, COMPLICATED CASE, ESPECIALLY WHEN THE MISREPRESENTATIONS ARE CALLED TO ITS ATTENTION WITH SPECIFICITY AND THE GOVERNMENT HAS BOTH THE TIME AND THE OPPORTUNITY TO MAKE A CORRECTION?

2. MAY THE GOVERNMENT USE MARIJUANA OFFENSES AS PREDICATE ACTS TO ESTABLISH VIOLATIONS OF THE FEDERAL RACKETEERING STATUTE (RICO)?

3. WHERE A DEFENDANT HAS COMMITTED ONLY ONE ACT, MAY THE GOVERNMENT PROVE A PATTERN OF RACKETEERING ACTIVITY, AS REQUIRED TO CONVICT A DEFENDANT OF RACKETEERING, BY CHARGING THE SINGLE ACT IN TWO SEPARATE COUNTS AND CLAIMING THAT THE SINGLE ACT IS A PATTERN BECAUSE IT CONSTITUTES TWO OFFENSES?

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This brief is filed pursuant to Rule 36.1 of the Rules of this Court. Consent to file has been granted by the Honorable Rex E. Lee, Solicitor General of the United States, and by James M. Shellow, Esq., counsel for the Petitioner. Letters of consent of both parties accompany this filing.

INTEREST OF THE *AMICI CURIAE*

The two organizations submitting this brief as amici curiae, the National Association of Criminal Defense Lawyers (NACDL) and the National Legal Aid and Defender Association (NLADA), represent lawyers, judges and other interested in our criminal justice system. The NACDL is a National non-profit organization based in Washington, D.C., with a membership of more than 4000 criminal defense lawyers, law professors and judges. Among the NACDL's stated objectives are the promotion and proper administration of criminal justice. The NLADA is a non-profit organization of public defender officers, legal services agencies and 2000 individual members, most of whom are engaged in private practice. Since 1911, the primary purpose of the NLADA has been to expand and improve the quality of legal services for the nation's poor.

Amici respectfully urge this Court to grant the petition for certiorari because it raises issues that are of general concern to lawyers and judges dealing with criminal cases in federal courts throughout the nation. This brief is written in support of the petition by Russell Hobson (petitioner) for consideration of his issues by this Court. With one exception, amici express no view on the merits of any question raised by petitioner; at this time their intention is to support his assertion that the case presents important questions of federal law deserving attention by the nation's High Court. The exception is that amici do support petitioner's argument that counsel have a duty of candor to appellate courts that requires accurate statements of a trial record, corrections of misstatements in appellate briefs, a response to specific allegations of factual errors in appellate briefs, and an attempt to correct misstatements of the record in appellate opinions that result from a misconception of the trial record.

QUESTIONS PRESENTED

1. DOES THE GOVERNMENT HAVE AN OBLIGATION UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND UNDER THE FEDERAL RULES OF APPELLATE PROCEDURE TO CORRECT SERIOUS MISREPRENTATIONS OF FACT THAT IT MAKES TO A COURT OF APPEALS WITH RESPECT TO THE CONTENTS OF THE RECORD IN A MULTIDEFENDANT, COMPLICATED CASE, ESPECIALLY WHEN THE MISREPRESENTATIONS ARE CALLED TO ITS ATTENTION WITH SPECIFICITY AND THE GOVERNMENT HAS BOTH THE TIME AND THE OPPORTUNITY TO MAKE A CORRECTION?

This case is typical of many federal criminal cases in the 1980's. It began when the government filed a 59 page indictment charging 12 individuals in 30 counts with a variety of offenses. The charges included racketeering, racketeering conspiracy, various other conspiracies and substantive violations of federal laws prohibiting importation and trafficking in controlled substances. The trial lasted approximately two weeks and produced thirteen (13) volumes of testimony plus numerous exhibits.

There is no doubt that the government established that some individuals were involved on a large scale with importation and distribution of marijuana. There seems to be no doubt, and we understand that petitioner has conceded throughout his appeal, that if the evidence is viewed in the light most favorable to the government there was evidence presented at trial which, if believed, would have warranted a jury's finding that on one, possibly two occasions, petitioner purchased large quantities of marijuana. Moreover, there seems to be no doubt, and

we believe this too is conceded by petitioner, that the government presented evidence which, if believed, would have warranted a jury's finding that on another occasion petitioner made a downpayment on a marijuana purchase that was never consummated.

Had the government charged petitioner with simple possession of marijuana, with attempted possession, or even with possession with intent to distribute (based on the quantity of marijuana purchased), it might well have convicted him and avoided the important questions that have worked their way to this Court. But the government chose not to pursue the obvious course with respect to to petitioner. Instead, it insisted upon charging petitioner with all of the crimes it attributed to the members of the group identified as running a fairly continuous marijuana importation and distribution operation.

Specifically, the government charged that petitioner has associated himself with a racketeering enterprise, which the indictment charges was "a group of individuals associated in fact for the purpose of importing multi-ton quantities of marihuana into the United States from a place outside of the United States, possessing multi-ton quantities of marihuana with intent to distribute and distributing within the United States, multi-ton quantities of marihuana," and that he had carried out the activities of the enterprise by making a downpayment on a purchase of marijuana (Count 2); that he conspired to violate the racketeering statute by agreeing to further the enterprise (Count 1); that he conspired with the other defendants to import marijuana (Count 3); that he imported marijuana by making a downpayment on a purchase that was never consummated (Count 4); that he conspired to distribute marijuana by the same conduct

that made him guilty of racketeering conspiracy (Count 5); and that he possessed marijuana with intent to distribute by making a downpayment on a purchase that was never consummated (Count 10).

Amici have read the pertinent record[1] in the case, the opinion of the court of appeals, and relevant portions of the government's brief in the court of appeals. This has enabled amici to make several observations with confidence, and these observations explain why amici believe that the ethical rule that petitioner would have this Court adopt is sound.

First, there is no doubt that four of petitioner's convictions depended upon proof that he knew that marijuana was being imported into the United States. The proof of racketeering, racketeering conspiracy, conspiracy to import marijuana, and actual importation all require some knowledge on petitioner's part that he was dealing with imported marijuana. The court of appeals recognized that this argument was before it.

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1. In preparing its amicus filing, amici did examine carefully the portions of the record in petitioner's case that were most important to their decision on whether to support the petition for certiorari. Amici also examined other relevant items. Among the documents that amici examined were the following: the indictment in the district court; petitioner's opening brief in the court of appeals; the government's brief in the court of appeals; petitioner's reply brief in the court of appeals; petitioner's petition for rehearing and rehearing en banc in the court of appeals; petitioner's certiorari petition; the decision of the court of appeals in *United States v. Phillips*, discussed *infra;* the petition for certiorari in *Gustafson v. United States*, No. 84-483, *cert. denied*, January 21, 1985; the government's brief in opposition in *Gustafson;* Gustafson's reply to the government's opposition; and a letter from petitioner's counsel to the Solicitor General, dated February 26, 1985, in which petitioner's counsel relates a Justice for correction of misstatements in its brief while petitioner's rehearing application was pending in the court of appeals.

Second, petitioner asserted at the trial level and in the court of appeals that he could not be convicted of conspiracy to distribute marijuana simply on the basis of proof that he purchased marijuana from the sellers once or twice. The court of appeals recognized that this argument was before it.

Third, petitioner asserted that he could not be convicted of possession of marijuana on which he had paid a downpayment because he never possessed it, neither actually nor constructively. The court of appeals recognized that this argument was before it.

Fourth, the briefs petitioner filed in the court of appeals —both the opening brief and the reply brief—stated to the court that there was no evidence to support a finding that petitioner knew that marijuana was being imported, that there was no evidence to prove that he was a continual or perpetual customer of the sellers of the marijuana, and that there was no evidence of either actual or constructive possession of marijuana in connection with the downpayment. The court of appeals recognized that this argument was before it.

Amici have analyzed the opinion of the court of appeals and have found that the court rejected petitioner's arguments as follows:

> a. The court rejected the argument that there was no evidence that petitioner was aware that marijuana was being imported because it found that he was one of the principal organizers of the purchase on which he made a downpayment, which involved the use of an airplane, and he was present at the organization's stash houses on numerous occasions.

b. The court accepted the argument that a simple buyer-seller relationship does not make the buyer a conspirator with the seller, but it concluded that petitioner purchased from the selling group on numerous occasions and was a frequent buyer.

c. The court rejected petitioner's argument that he was not in possession of the marijuana on which he made a downpayment because he was involved in a previous effort to buy marijuana that had failed and had pressured the participants in the failed venture to make another attempt to secure marijuana. Thus, he was guilty as an aider and abettor.

It seems readily apparent that the court of appeals relied heavily upon the government's brief in reaching its conclusions. The government's brief is as interesting for what it does not contain as for what it does. Beginning on page 5 of the brief, the government presents an extensive overview of its evidence. That overview continues for 31 pages. Petitioner's name appears in only three places. On page 6, the government asserts without a record citation that petitioner made cash payments for marijuana. On page 10, the government asserts that Hobson took delivery of marijuana on one occasion. The government offered a citation to the record. (Although the petitioner points out in his briefs that the government's two key witnesses disagreed over whether Hobson was present on this occasion, the government fails to address petitioner's assertion or to state whether or not there was a conflict on the point). On pages 29-30, the government asserts that petitioner was involved in an unsuccessful attempt to purchase marijuana and that he pressured the participants to make another attempt to obtain marijuana. These efforts are referred to by the government as the airplane

ventures. The government offered citations to the record in this instance also.

Anyone who reads the government's statement of its case must be struck by the low visibility of petitioner in the activities giving rise to the prosecution. The statement of the case offers virtually no support for most of the convictions secured by the government, since there is no description evidence demonstrating knowledge or importation and no description evidence demonstrating a continuous buyer-seller relationship. The government spends 100 pages in its brief dealing with many other defendants before returning to petitioner. Then, on page 137, without any citation to the record, the government asserted that "middlemen such as Hobson . . . stood by awaiting the completion of the counting and weighing, after which they immediately removed sizable portions of the massive loads" and implied that petitioner might have purchased marijuana on 25 or 30 occasions (citing two pages of the record). Again, without a record citation, the government asserted at page 137-38, that petitioner stood by ready to take delivery of all marijuana imported by other defendants.

The government asserted on page 139 that petitioner caused the importation of marijuana alleged in count 4. Although the government offered no citation to the trial record, it is clear from the indictment that the government misstated to the court of appeals the nature of count 4. It did not involve importation of marijuana on a ship called the *Tanila* as the government asserted; it involved a downpayment on a purchase of marijuana that was never consummated.

On pages 139-140, without any citation to the record, the government implies that petitioner was a continuous customer and not a purchaser of marijuana on isolated occasions.

Finally, the government repeats by implication on page 142 an argument made at pages 29-30 that petitioner had been involved in "airplane ventures" and that petitioner was in constructive control of the marijuana on which he had made a downpayment. The government cites a single page in the record when it refers to petitioner.

After the government filed its brief with the court of appeals, petitioner filed a reply brief pointing out numerous factual mistakes by the government. Once the court of appeals rendered its decision, petitioner sought a rehearing or rehearing en banc. For the second time, he pointed to the factual misstatements of the record that allegedly filled the government's brief and misled the court. Specifically, and with supporting citations to the record, petitioner identified in both the reply brief and the petition for rehearing the facts which he believed the government had misstated or the court of appeals had misunderstood:

> a. Petitioner purchased marijuana on only one or, at most, two occasions from members of the enterprise, depending on which of the government's key witnesses was believed.
>
> b. There was no evidence that petitioner was told that his downpayment on marijuana would be used to purchase imported marijuana. In fact, the government's evidence was that petitioner was to bring trucks to a restaurant where he was to be led to the marijuana. No witness, document or tape recording

suggested even a hint that an airplane would be used or that the marijuana would be imported.

c. There was no evidence that petitioner was involved in the first airplane venture which the government mentioned in its brief. In fact, the government's evidence established conclusively that he had no involvement.

d. There was no evidence that petitioner ever stood around stash houses awaiting for marijuana to be counted.

e. There was no evidence that petitioner had agreed to purchase any marijuana other than on isolated occasions. Certainly, no one identified him as a purchaser of last resort.

f. The indictment charging aiding and abetting possession of marijuana in Count 10 specified that petitioner was a principal and that he aided and abetted other named persons. Despite the fact that the indictment was drafted in other counts to charge aiding and abetting of persons known and unknown, the government argued an aiding and abetting theory not charged in the relevant count. The government compounded its error by mistakenly referring to one airplane venture which had no relationship at all to petitioner.

As noted at the outset, amici cannot identify whether petitioner's assertions of misstatements of fact are accurate, either individually or in their totality. Amici can and do assert, however, firm support for the proposition that when counsel represents to an appellate court that an opposing party has misstated the record and supports this representation with specific examples and record citations, an appellate court should require the party whose representations have been attacked to respond with specific citations to the record.

In petitioner's case, it is almost inconceivable that the government would not have felt obliged to respond to petitioner's reply brief and that it would have ignored the petition for rehearing. Yet, amici have discovered that the government ignored both filings (at least officially in the court of appeals, since not a single piece of paper was filed in response to either the reply or the petition). Amici also have learned that counsel for petitioner telephoned the Appellate Section of the Department of Justice to implore it to check the record following the court of appeals' decision and before the petition for rehearing was filed. The government declined to file anything further with the court of appeals.

Amici urge this Court to adopt a rule that would require litigants whose representations of the record are attacked, and who have failed to support their statements with complete record citations, to respond to the attacks. In a case with many defendants and many counts, a record that runs 13 volumes, and separate issues raised by the several defendants who are convicted, it simply is not realistic to assume that each judge on a panel of the court of appeals (or an *en banc* court) will read each page of the record to check for himself or herself whether unsupported assertions in a brief are fair representations of the record. The natural tendency is to trust the brief, especially when it is filed in the name of the United States.

Were the Court to adopt the rule suggested herein and by petitioner, a court of appeals, by checking the challenged facts against specific citations to the record, could assure itself that crucial record references are accurate and could correct any errors in briefs. Without adoption of such a rule, the truth is that complex cases may be

decided on the basis of incorrect assumptions about the record.

Amici agree with petitioner that the suggested rule would further the goal of Federal Rule of Criminal Procedure 28(a)(3), which requires a party to make "appropriate references to the record" in its statement of facts. certainly, complicated cases may be well suited to briefs that state facts throughout. But such briefs should not be immune from the requirements of Rule 28(a)(3).

Amici further agree that the principles of due process that underlie this Court's decision in *United States v. Agurs*, 427 U.S. 97 (1976), and the earlier cases discussed therein should apply with the same force on appeal as at trial. Thus, when the government has been placed on notice that its statements to a court are false, it has a duty to take action to assure that it does not mislead the court. Misstatements of fact do as much damage on appeal as they do at trial.

Although amici cannot take a position at this time on the merits of the allegations that the government misrepresented facts and that the court of appeals misapprehended the true state of the record, they do believe that if these allegations prove to be in large part correct, at a minimum a remand for a new appeal in which the government would be required to file a brief that conforms to Rule 28 and to basic notions of fairness and due process should be required. Should this Court grant certiorari on all issues raised by petitioner, a new trial might be required, depending on the disposition of the other issues raised in the petition. If a new trial is required, a remand to the court of appeals would, of course, be unnecessary.

2. MAY THE GOVERNMENT USE MARIJUANA OFFENSES AS PREDICATE ACTS TO ESTABLISH VIOLATIONS OF THE FEDERAL RACKETEERING STATUTE (RICO)?[2]

Petitioner has presented to this Court substantial arguments in support of the proposition that the Congress enacted the federal racketeering statute in 1970 specifically excluded marijuana offenses from its coverage. NACDL has made no effort to independently examine the legislative history, except to compare the history compiled by petitioner with the history and analysis offered to this Court by the Solicitor General in *Gustafson v. United States,* No. 84-482, cert. denied, January 21, 1985. Without taking a position on the merits of the issue raised by petitioner, Amicus NACDL respectfully requests that this Court recognize the substantiality of the question presented and review it according to the same standards of statutory construction that the Court has employed in the last several years in analyzing RICO itself and other statutes.

This Court has said on many occasions that the starting point for analysis of a statute is its language. See, e.g., *Lewis v. United States,* 445 U.S. 55, 60 (1980). It has made this point specifically with respect to the racketeering statute in *United States v. Turkette,* 452 U.S. 576, 580 (1981). In *Turkette,* the Court indicated that the structure of a statute was also important in determining its purpose. *Id.* at 586-87. The Court also declined to adopt the rule of lenity in deciding *Turkette,* reasoning

2. The NLADA joins this brief only on the first question. The NLADA has made no judgment as to the merits of the next two questions. It has determined only that these questions are outside the principal areas of interest of the members of the Association.

that the rule should operate only to resolve an ambiguity and there was no ambiguity to resolve in the case. *Id.* at 587 n. 10.

Applying the *Turkette* analysis to his claim that the statute does not reach marijuana transactions, petitioner notes that 18 U.S.C. § 1961(1)(D) defines predicate acts as including offenses "involving . . . the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in *narcotic or other dangerous drugs*, punishable under any law of the United States." (Emphasis added). The word "marijuana" is excluded even though it is explicitly included in the federal wiretap statute sponsored by the same Senator (McClellan) who sponsored RICO, authored by the same person who authored RICO (Robert Blakey),[3] and drafted by the same committee (Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee) that promulgated RICO.

Moreover, Professor Blakey himself appears on petitioner's brief and repeats his analysis of the legislative history that he made in 1980 in his published materials on RICO, *Materials on RICO: Criminal Overview*, 1 Techniques in the Investigation and Prosecution of Organized Crime 24 (Cornell Institute on Organized Crime, Blakey ed. 1980). Blakey refers to the decision to exclude marijuana as a conscious one, made despite suggestions by the Department of Justice that marijuana should be within the coverage of RICO.

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3. Federal courts have recognized Blakey as the principal author of RICO. See *United States v. Lee Stoller Enterprises, Inc.*, 652 F.2d 1313, 1319 n. 10 (7th Cir.) (en banc), *cert. denied*, 454 U.S. 1082 (1981). This Court has recognized his role in drafting the wiretap statute. *United States v. Giordano*, 416 U.S. 505, 517-18 & n. 7 (1974).

Petitioner has offered the Court the intertwined legislative history of RICO and the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 801-966. His petition cites congressional drafting in 1970 that covers all controlled substances, including marijuana, as well as other statutes which provide special treatment for marijuana. It appears from this history that Congress knew both how to include marijuana and how to exclude it from the scope of various statutes.

The "plain language" of RICO, read in light of the structure of the statute and its relationship with the wiretap statute and the Comprehensive Drug Abuse Prevention and Control Act, would appear to support petitioner's conclusion. That conclusion is bolstered by petitioner's explanation as to why Congress would have treated marijuana differently from other controlled substances—to wit, to avoid having small marijuana distributors, who might be misdemeanants under the 1970 drug reform statute, from being treated as racketeers as a result of state laws punishing in 1970 even small transfers of marijuana as gifts as felonies.

The government's response to a similar petition, which did not have Professor Blakey of counsel, in the *Gustafson* case essentially asks this Court to ignore the choice of language, the legislative history and the interrelationship of the wiretap, drug reform and RICO statutes. This, amicus NACDL respectfully suggests, is precisely what the Court ought not do.

Earlier this term in *Garcia v. United States,* 105 S.Ct. 479 (1984), this Court reaffirmed its approach to statutory construction in criminal cases. The Court looked to the statute as enacted and found that it was plain and

unambiguous. It analyzed the structure of the statute and it looked to the legislative history for congressional intent. *Id.* at 482-84.

Thus far, the language, its background and the intent of Congress appear to support petitioner's reading of the statute. That alone might be sufficient reason for amicus to support the petition for certiorari in this case. But there is another reason, more difficult to articulate and more important to the long range development of justice in federal courts. That reason is the importance of a perception of this Court as evenhanded in its treatment of federal statutes—i.e., favoring neither the government nor the accused, but reading statutes according to a rule of law.

There is a perception—unfair perhaps, but nonetheless real—among many lawyers who represent defendants in criminal cases that the canons of statutory construction in recent years are used only to produce expansive, rather than restrictive readings. Simply stated, there is fear that the Court will avoid cases which might result in narrowing constructions of a criminal statute in favor of cases in which the principles articulated in the cases cited above will favor the government.

This perception and related fear can best be explained by a single question asked by many who are familiar with this petition. Before putting the question, amicus NACDL would make an observation: Amicus believes that the petitions filed with the Court over the last several years probably demonstrate more than citations to lower court decisions that the racketeering statute is used with increasing frequency every year. It has become a mainstay in the government's prosecution of crime. In light of this observation, amicus NACDL puts the following

question: *If the court of appeals had accepted petitioner's argument and held that RICO does not cover marijuana offenses, is there any doubt that this Court would have granted review at the government's behest?*

It would be hyperbole to suggest that the answer that amicus receive when this question is asked always is "yes," but it would be untrue to say that the answer is often "no". NACDL believes that the importance of a question like the one posed by petitioner should be determined without regard to which party prevailed in the lower court.

Amicus NACDL wishes to emphasize that they do not argue that should the Court grant review, it might not reject the petitioner's arguments. But, should the Court do so, amicus believes the analysis almost certainly would have to be more persuasive than the government's brief in opposition in *Gustafson.*

The government suggested in *Gustafson* that there was no conflict in the circuit as to the reach of RICO. This is true, but it also is misleading. For all practical purposes only one circuit has yet considered the question raised by petitioner. The panel that decided petitioner's case cited *United States v. Phillips,* 664 F.2d 971 (5th Cir. 1981) (Unit B), *cert. denied,* 457 U.S. 1136 (1982), and indicated that it was bound by that decision. In fact, the *Phillips* court never considered the language of the statute, the relationship of the statute to the wiretap and drug reform legislation, or any legislative history. Now the law of the circuit is, without consideration, that marijuana falls within RICO.

Although a denial of certiorari is technically supposed to have no precedential significance, the fact is that if

this Court denies petitioner's certiorari petition after having denied Gustafson's, the government will rely upon both cases as expressing this Court's judgment that the issue is not important enough for it to examine de novo. The way of appellate courts is to follow this Court's lead. They are likely to cite the Eleventh Circuit's decisions and this Court's denial of review and close their eyes to the issue.

The question presented will never be more clearly focused. The legislative history, the statutory background and the language are before this Court. The trial will only get older with time. The NACDL asks this Court to examine petitioner's claim, a defendant's request that the statutory canons this Court has used to sustain expansive readings of criminal statutes be used evenhandedly to narrow a particular statute. Should this Court grant review and permit amicus NACDL to address the merits of the claim, amicus would be honored to do so.

3. WHERE A DEFENDANT HAS COMMITTED ONLY ONE ACT, MAY THE GOVERNMENT PROVE A PATTERN OF RACKETEERING ACTIVITY, AS REQUIRED TO CONVICT A DEFENDANT OF RACKETEERING, BY CHARGING THE SINGLE ACT IN TWO SEPARATE COUNTS AND CLAIMING THAT THE SINGLE ACT IS A PATTERN BECAUSE IT CONSTITUTES TWO OFFENSES?

The analysis of this Court's treatment of statutory construction of criminal statutes offered in connection with the second question is equally applicable to the third question.

The RICO statute requires a "pattern of racketeering activity" to sustain a conviction. 18 U.S.C. § 1962(c).

A pattern of racketeering activity requires more than one act. 18 U.S.C. § 1961(5). The trial judge instructed the jury in petitioner's case that to convict petitioner, the jury had to believe that he was guilty on Counts 4 and 10. These counts charged petitioner with importation of marijuana and possession as a result of his doing a single act—i.e., making a downpayment on a purchase of marijuana.

The government argued, and the court of appeals agreed, that the downpayment could qualify as two acts because it could support two substantive convictions. But, this analysis appears to fly in the face of the statute, 18 U.S.C. § 1961(5), which defines a pattern of racketeering activity as requiring

> at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act.

This suggests that one act will not suffice, especially in view of the fact that the statute does not require "two crimes." Instead two acts must be proved.

This Court stated in *United States v. Turkette,* 452 U.S. at 583, that the pattern of racketeering envisoned by the statute is "a *series* of criminal acts" as defined by the statute. (Emphasis added). Thus, the construction by the court of appeals is inconsistent with the face of the statute and this Court's dictum concerning its import.

Furthermore, the government's argument is contrary to its own guidelines, which were in effect when the indictment was returned in this case. The government adopted six guidelines on January 16, 1981, which are incor-

porated in the United States Attorney's Manual, Title 9, Criminal Division, as Section 9-110.310 through 9-110.-360. Guideline IV reads as follows:

> No indictment shall be brought charging a violation of 18 USC 1961(c) based upon a pattern of racketeering activity growing out of a single criminal episode or transaction.

The Commentary to the Guidelines is as follows:

> The purpose of these guidelines is to prevent a pattern of racketeering activity being charged which lacks the attributes which Congress had in mind but which is literally within the statute.

In *Garcia v. United States,* 105 S.Ct. at 485 n. 4, this Court paid attention to the way in which government prosecutors treated a criminal statute. Petitioner does not ask the Court to hold that the guidelines are binding law, but merely to recognize that they were adopted at a time when the government was beginning to make substantial use of the RICO statutes and deserve to be given some weight.

It appears that the language of the statute, the language of this Court in *Turkette,* and the language of the Department of Justice's guideline all suggest that one act is not enough to make out a pattern. Amicus believes that the issue raised by petitioner warrants plenary consideration by this Court for many of the same reasons that the second question does. Once more, amicus NACDL would be honored, if review is granted, to submit its views on the merits if the Court wishes it to do so.

CONCLUSION

For the reasons stated in this brief, amici respectfully urge this Court to grant petitioner's request for a hearing in the Supreme Court of the United States.

Respectfully submitted,

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By: _____
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By: _____
JOHN A. CONVERY
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Brief of Amicus Curiae, National Association of Criminal Defense Lawyers and National Legal Aid and Defender Association has been mailed to United States Solicitor General, Rex E. Lee, Esq., Department of Justice, Room 5614, Washington, D.C. 20530 and Mr. Mervyn Hamburg, Esq., Attorney, Appellate Section Criminal Division, Department of Justice, P. O. Box 899, Ben Franklin Station, Washington, D. C., counsel for respondent, and Mr. James M. Shellow, Esq., 222 East Mason Street, Milwaukee, Wisconsin 53202, on this the _____ day of March, 1985.

GERALD H. GOLDSTEIN

APPENDIX A

U.S. DEPARTMENT OF JUSTICE
Office of the Solicitor General
Washington, D.C. 20530

February 14, 1985

Gerald H. Goldstein, Esquire
Goldstein, Goldstein and Hilley
29th Floor Tower Life Building
San Antonio, Texas 78205

Re: Russell Hobson, III v. United States
No. 84-1148

Dear Mr. Goldstein:

In response to your letter of February 11, 1985, I hereby consent to the filing of a brief amicus curiae on behalf of the National Association of Criminal Lawyers in the Supreme Court in this case.

Sincerely yours,

/s/ REX E. LEE
Rex E. Lee
Solicitor General

APPENDIX B

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March 4, 1985

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Washington, D.C. 20006

RE: RUSSELL HOBSON III v. UNITED STATES
No. 84-1148, United States Supreme Court

Gentlemen:

On behalf of my client in the above-captioned matter, Russell Hobson, I hereby consent to the filing of an amicus curiae brief in this case by the National Association of Criminal Defense Lawyers and the National Legal Aid and Defender Association.

Very truly yours,

SHELLOW, SHELLOW & GLYNN, S.C.

By: /s/ JAMES M. SHELLOW
James M. Shellow

JMS:pap

cc: Mr. Rex Lee
Mr. Alexander Stevas